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**FEB 06 2009**

**OFFICE OF PETITIONS**

In re Application of :  
Solheim, et al. :  
Application No. 10/017,833 : **ON PETITION**  
Filed: December 12, 2001 :  
Attorney Docket No. 129250- :  
002052/US/CPA :

This is a decision on the "PETITION TO WITHDRAW HOLDING OF ABANDONMENT OR, IN THE ALTERNATIVE TO REVIVE BASED ON UNAVOIDABILITY OR UNINTENTIONAL ABANDONMENT", filed January 18, 2009, which is being treated as a petition to withdraw the holding of abandonment under 37 CFR 1.181, or in the alternative to revive under 37 CFR 1.137(a) or under 37 CFR 1.137(b).

The petition under 37 CFR 1.181 is **DISMISSED**.

The petition under 37 CFR 1.137(a) is **DISMISSED**.

The petition under 37 CFR 1.137(b) is **GRANTED**.

The above-identified application became abandoned for failure to timely file a response to the non-final Office mailed May 14, 2008. This Office action set an extendable period for reply of three (3) months. No reply having been received, the application became abandoned on August 15, 2008. The Office mailed a Notice of Abandonment on January 27, 2009.

Petition Under 37 CFR 1.181:

Petitioner explains that while he did file an Amendment in the instant application on September 13, 2008, the Amendment was directed to another one of petitioner's applications. Petitioner did not realize this error until contacting the Electronic Business Center (EBC), at which time petitioner was informed that the Amendment was removed from the instant application, and properly inserted into the application for which it belonged. Petitioner contends that had the EBC forwarded the Amendment on to the Examiner for the instant application, the Examiner would have recognized the error and informed Applicant, thus giving Applicant time to timely file an Amendment in the instant application, avoiding abandonment.

Petitioner's argument has been considered, but is not persuasive. It has been Office policy that where the Office can determine the correct application file that the papers were actually intended for, the Office will transfer the papers to the correct application file. See MPEP 724.05. The Office properly did so in this instance.

Petition Under 37 CFR 1.137(a):

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the reply required to the outstanding Office action or notice, unless previously filed; (2) the petition fee set forth in 37 CFR 1.17(1); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable; and (4) Any terminal disclaimer (and fee as set forth in § 1.20(d)) required pursuant to paragraph (d) of this section. The instant petition lacks item (3).

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable: "The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business."<sup>1</sup>

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<sup>1</sup> In re Mattulath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 U.S.P.Q. 666, 167-68 (D.D.C. 1963), aff'd, 143 U.S.P.Q. 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913).

Moreover, delay resulting from the lack of knowledge or improper application of the patent statutes, rules of practice or the Manual of Patent Examining Procedure, however, does not constitute "unavoidable" delay.<sup>2</sup>

Here, petitioner has not demonstrated that the cause of the delay at issue, filing an Amendment intended for one application into another an other application, was unavoidable. Rather, it is one that could have been avoided with the reasonable exercise of due care.

The \$270 fee for the petition under 37 CFR 1.137(a) has been charged to Deposit Account No. 50-3777, as authorized. The petition fee required for a petition to revive is required for the filing, not merely the grant, of the petition.<sup>3</sup>

Petition Under 37 CFR 1.137(b):

With the instant petition, petitioner has paid the petition fee, made the proper statement of unintentional delay, and submitted the required reply in the form of an Amendment.

The petition fee of \$810 has been charged to Deposit Account No. 50-3777, as authorized.

The application is being forwarded to Group Art Unit 2613 for consideration of the Amendment filed January 18, 2009.

Telephone inquiries related to this decision should be directed to the undersigned at (571)272-3207.



Cliff Congo  
Petitions Attorney  
Office of Petitions

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<sup>2</sup> See Haines, 673 F. Supp. at 317, 5 U.S.P.Q. 2d at 1132; Vincent v. Mossinghoff, 230 U.S.P.Q. 621, 624 (D.D.C. 1985); Smith v. Diamond, 209 U.S.P.Q. 1091 (D.D.C. 1981); Potter v. Dann, 201 U.S.P.Q. 574 (D.D.C. 1978); Ex parte Murray, 1891 Dec. Comm'r Pat. 130, 131 (1891).

<sup>3</sup> See MPEP 711.03(c)(II)(B).